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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1369

RUSSELL G. OSWALD, Commissioner of Correctional Services; PAUL J. REGAN, Chairman of the Board of Parole; J. EDWIN LAVALLEE, Superintendent of Clinton Correctional Facility; JOHN T. DEEGAN, Superintendent of Auburn Correctional Facility; NEW YORK STATE BOARD OF PAROLE; and the NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES,

Petitioners,

against

EUGENE RODRIGUEZ, MICHAEL KITZOFF and JOHN KRITSKY,

Respondents.

BRIEF OF AMICUS CURIAE

INTEREST OF AMICUS

The American Bar Association is a national organization of the legal profession. It has more than 155,000 members from all states and has for some years maintained an active interest in criminal justice improvement. One of its recent and more ambitious undertakings in this area has been the Project on Minimum Standards for Criminal Justice, elements of which (as referred to in our argument) are pertinent to issues before the Court in this case.

In 1970, the American Bar Association established an interdisciplinary Commission on Correctional Facilities and Services to address its growing interest in and commitment to the correctional phase of criminal justice administration. The Commission has undertaken a program to stimulate broadscale improvement in all aspects, legal and operational, of the nation's systems for correction and rehabilitation of criminal offenders. Among the Commission's several action projects is a Resource Center for Correctional Law and Legal Services concerned with resolution of the growing number of legal and constitutional issues being raised in connection with the operation of correctional programs and systems. Focusing on the demands of both law and sound correctional practice, the Commission is anxious to contribute to full consideration of legal questions which bear so significantly on the effectiveness and fairness of our correctional apparatus.

As the Association's major instrumentality for correctional reform, the Commission has a special interest in the issues being litigated in this case, which relate directly to the future role of our judicial systems in protecting and enforcing the federal and constitutional rights of those under correctional restraint.

It is the belief of the American Bar Association that this brief will provide a significant contribution to the resolution of the issues now before this Court.*

QUESTION PRESENTED

Must a state prisoner, unlike any other citizen of the United States, first exhaust all possible state judicial remedies before seeking in federal court the protection of the Civil Rights Act, 42 U.S.C. §1983, to vindicate rights guaranteed by the United States Constitution?

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* Copies of the letters from attorneys for both parties agreeing to the ruling of this amicus brief have been filed with the clerk of this Court.

STATEMENT OF THE CASE

Respondents, Rodriguez, Kritsky and Katzoff, were incarcerated in different penal institutions of the State of New York at the time of filing their *pro se* complaints in the District Court for the Northern District of New York, alleging unconstitutional deprivation of good behavior time credits under both the Federal *Habeas Corpus* Statute, 28 U.S.C. §2241 *et seq.*, and the Civil Rights Act, 42 U.S.C. §1983. All three *pro se* complaints received favorable disposition in the district court, the disputed good time credits being ordered restored. *Rodriguez and United States ex rel Rodriguez v. McGinnis*, 307 F. Supp. 627 (N.D.N.Y. 1969); *Kritsky and United States ex rel Kritsky v. McGinnis*, 313 F. Supp. 1247 (N.D.N.Y. 1970). The *Katzoff* opinion was not officially reported.

Divided panels of the Second Circuit reversed the decisions of the lower court in the cases of *Rodriguez* and *Katzoff* and held, among other things, that Respondents had failed to exhaust their state court remedies as required by 28 U.S.C. §2254(b) and (c). *Rodriguez and United States ex rel Rodriguez v. McGinnis*, 441 F. 2d 558 (2nd Cir. 1971); *United States ex rel Katzoff v. McGinnis*, 441 F. 2d 558 (1971). The *Rodriguez* panel also found that compliance by state corrections officials with §236 of the New York Correction Law* was not constitutionally

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*New York Correction Law §236:

"In all cases . . . where the [prison commutation] board shall withhold the allowance of the whole or any part of reduction of sentence for good conduct and for efficient and willing performance of duties assigned, they shall forward with their report to the commissioner of correction their reasons in writing, for such disallowance. The action of the board in granting or withholding reductions shall be deemed a judicial function and shall not be reviewable if done according to law."

required, and that Rodriguez did not lose good time credits solely as a result of his refusal to inform corrections officials of the source of contraband correspondence found in his possession.

The *Katzoff* panel, in holding that exhaustion was required, found that available state remedies were adequate regardless of the proximity of Katzoff's release date. Petitions for rehearing in *Rodriguez* and *Katzoff* were denied on July 19, 1971.

The *Kritsky* case, *supra*, reached argument before yet another panel of the Second Circuit, but prior to reaching decision, all three cases, *Kritsky*, *Rodriguez* and *Katzoff*, were ordered consolidated for *in banc* consideration by the Second Circuit Court of Appeals. On January 25, 1972, the *in banc* court issued a 9-3 order affirming the judgments of the District Court, *Rodriguez and United States ex rel Rodriguez v. McGinnis*, 456 F. 2d 79 (2nd Cir. 1972) (*in banc*), based primarily upon authority of *Wilwording v. Swenson*, 404 U.S. 249 (1971).

A petition for *certiorari* was filed on April 24, 1972, and *certiorari* was granted on June 19, 1972.

SUMMARY OF THE ARGUMENT

At least since the Civil War, if not earlier, both Congress and this Court have consistently stressed that the proper forum for the resolution of federal constitutional complaints is federal court. The history of the Civil Rights Act of 1871, 42 U.S.C. §1983, is replete with evidence that the Act was passed specifically to allow federal jurisdiction over federal constitutional claims without the requirement that plaintiffs first exhaust their state judicial

remedies. This Court has recognized the verity of that view in numerous cases, both in non-prisoner (*McNeese v. Board of Education*, 373 U.S. 688 (1963)) and prisoner (*Wilwording v. Swenson*, 404 U.S. 249 (1971)) cases. Any contraction of this rule, in addition to effectively rewriting the legislation, would cause innumerable practical and theoretical difficulties, since there is no logical stopping point between prisoner §1983 suits and all other §1983 suits or, in fact, between §1983 suits and all other suits brought to redeem constitutional rights. To require exhaustion here might inevitably lead to a requirement of exhaustion in every case in which a constitutional issue is raised; the precept that federal courts stand ready to defend federal rights would be severely diluted.

Arguments that the federal courts are overloaded with prisoner §1983 actions are factually erroneous. A hard look at data compiled by the Administrative Office of the United States Courts demonstrates that (1) prisoner civil rights suits have increased less than many other types of civil action over the last few years; (2) there is firm reason to believe that they will decrease in absolute terms in the next few years; (3) that essentially no trial time is occupied with the vast majority of prisoner civil rights suits. Moreover, judicial action to restrict jurisdiction at this point might be precipitous. Other systems of delivery of legal services, such as the use of law students, paraprofessionals, ombudsmen, grievance mechanisms inside our penal institutions, and others, are now being employed in an effort to both improve the quality of prisoner legal aid and reduce the number of frivolous complaints filed in §1983 actions. These methods, supported by correctional administrators and high officials at all levels of government, are more productive, as well as less discriminatory, ways of seeking to reduce prisoner suits, and should at least be given an opportunity to work before federal jurisdiction is cut off by a narrowing interpretation of the Civil Rights Act.

ARGUMENT

I. BECAUSE THE CIVIL RIGHTS ACT IS SUPPLEMENTAL TO STATE REMEDIES, THIS COURT HAS NEVER REQUIRED ANY CITIZEN–PRISONER OR NON-PRISONER–TO EXHAUST STATE REMEDIES

Ever since this Court's opinion in *Monroe v. Pape*, 365 U.S. 167 (1961), resuscitating the Civil Rights Act, both this Court and others have stressed that the remedy of §1983 is supplemental to other existing remedies, whether state or federal. Thus, in *Monroe*, this Court declared:

> The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in federal court.
>
> 365 U.S. at 183

This was not a new doctrine. Much earlier, this Court had held that federal plaintiffs need not seek a state remedy before filing in federal court, whether in a diversity case, *City Bank v. Schnader*, 291 U.S. 24 (1934), or in a case based specifically on §1983, *Lane v. Wilson*, 307 U.S. 268 (1939). One writer, commenting on *Monroe*, asserted that historically the rule had been that "If the remedy is one which is traditionally judicial and that matter is one which is cognizable by both state and federal courts, a plaintiff is under no obligation to seek redress in the state courts and may proceed immediately in the federal court." Graham, The Federal Courts and Exhaustion of State Remedies, 36 Conn. B.J. 60, 65 (1962). This view has been consistently repeated since that time. *McNeese v. Board of Education*, 373 U.S. 668 (1963); *Damico v. California*, 389 U.S. 416

(1967). This Court has specifically ruled so in regard to prisoner suits on several occasions, the last time in the past term of this Court. *Wilwording v. Swenson*, 404 U.S. 249 (1971); *Houghton v. Schafer*, 392 U.S. 639 (1968). The question now is whether these precedents—and the policies behind them—are to be overruled.

A. The Legislative History of §1983, and Other Federal Jurisdictional Statements Make Clear the Desire of Congress that Federal Courts Protect Federal Rights

The Court's past position that §1983 never requires exhaustion is consonant with the history of that act. Congressional debate demonstrates that the statute was passed primarily, but not exclusively, to allow blacks the right to seek federal protection from federal courts for effectuation of federal rights, without the necessity of going through a state system. For example, Senator Edmunds, a Senate manager for the bill, specifically declared:

> We do not undertake in this bill to interfere with what might be called a private conspiracy growing out of a neighborhood feud of one man or set of men against another to prevent one getting an indictment in the State courts against men for burning down his barn; but, if in a case like this, it should appear that this conspiracy was formed against this man because he was a Democrat, if you please, or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter . . . then this section could reach it.
>
> Cong. Globe, 42nd Cong. 1st Session 567 (1871)
> See also *id.*, at 334, 505-506

Similarly, the House Sponsor of the bill, Representative Shellabarger, said:

> [Section 1983] not only provides a civil remedy for persons whose former condition may have been that of slaves, but also to all people where, under color of State law, they or any of them may be deprived of rights to which they are entitled under the Constitution by reason and virtue of their national citizenship.
>
> *Id.*, App. 68

Although these legislators quite likely held the view that the state court systems might be inherently biased against claims brought by blacks, two factors militate against any conclusion that this was the sole force behind the legislation. First, as the foregoing remarks of two sponsors of the bill demonstrate, the legislation was not expressly restricted to blacks, but opened the door to the federal courts to any person or group which believed itself to suffer from some discrimination in violation of the Constitution. Second, the belief was emerging in Congress that federal rights *should* be protected by federal courts. Although this states a principle now long accepted in our jurisprudence, the concept was not well accepted then. Only four years after passage of the Civil Rights Act, Congress specifically acted to ensure that federal rights of all kinds, not otherwise covered by prior legislation, would indeed receive the protection afforded by federal courts. In 1875, Congress extended federal court jurisdiction to *all* cases involving federal questions. Act of March 3, 1875, §1, 18 stat. 470. See Forrester, The Nature of a Federal Question, 16 Tul. L. Rev. 363 (1942); Chadbourn and Levin, Original Jurisdiction of Federal Questions, 90 U. Pa. L. Rev. 639 (1942).

Prior to 1875, federal courts in this country were, in many ways, simply appellate courts for decisions rendered by state courts. This system had two major defects: (a) it made the federal courts virtually impotent to protect federal rights; (b) when a federal court did protect federal rights, it was only when it overruled an earlier decision by a state court, thus increasing state-federal tension. For these reasons, Congress in 1875 enacted the predecessor of 28 U.S.C. §1331, granting original federal jurisdiction in cases involving "federal questions".

It seems clear that the same motivation which impelled Congress in 1875 to cover all federal rights with a blanket statute (28 U.S.C. §1331) informed the passage, in 1871, of the Civil Rights Act, geared to protect specific federal rights stemming from the Constitution (42 U.S.C. §1983). At the time the Civil Rights Act was passed, most citizens were required to go to state court to enforce their federal rights. The Civil Rights Act changed that situation and enabled citizens to seek relief directly from the federal courts. In the absence of general "federal question" jurisdiction of the courts at that time and in view of what later followed in 1875, Congressional intent of non-exhaustion with respect to constitutionally-protected rights seems all the more evident.

Much has gone into determining what is a "federal question" in the century since §1331 was passed[1], but the position of this Court, both in cases raising that precise issue and those involving other questions of state-federal

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[1] See e.g., *Gully v. First National Bank in Meridian*, 299 U.S. 109 (1936); *Feibleman v. Packard*, 109 U.S. 421 (1883); *Smith v. Kansas City Title and Trust Company*; 255 U.S. 180 (1921). See also Cohen, The Broken Compass: The Requirement that a Case Arise "Directly" Under Federal Law, 115 U. Pa. L. Rev. 840 (1967); Friendly, In Praise of Erie and the New Federal Common Law, 39 N.Y.U. L. Rev. 383 (1964); Mishkin, The Federal "Question" in the District Courts, 53 Colum. L. Rev. 157 (1953).

relations, has been firm—federal courts are to protect federal rights. A long line of cases, from *Johnson v. Zerbst*, 304 U.S. 458 (1938) to *Daniels v. Allen*, 344 U.S. 443 (1953), to *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) to *Fay v. Noia*, 372 U.S. 391 (1963) has reiterated this theme.

The wisdom of this approach has been demonstrated repeatedly in the years since that decision. A notable instance is the school desegregation cases, in which the federal courts sought to shield black citizens from discrimination from all governmental bodies, state and federal. In supporting general federal jurisdiction over federal rights questions, the American Law Institute, in a comprehensive study of state/federal judicial relationships, focused on this point:

> Recent litigation involving civil rights has dramatized the need for an independent system of federal courts to vindicate federal rights.
>
> ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 163 (1969)

The rationale is sound, both on a theoretical and a practical basis. Federal courts should protect federal, constitutional rights; that is their prime *raison d'etre*. As this Court said in *McNeese v. Board of Education*, 373 U.S. 668, 672 (1963):

> We would defeat [the] purposes [of section 1983] if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court.

The *McNeese* Court then quoted the stirring words of Judge Alfred J. Murrah in *Stapleton v. Mitchell*, 60 F. Supp. 51 (1945):

> We yet like to believe that wherever the Federal courts sit, human rights under the Federal Constitution are always a proper subject for adjudication, and that we have not the right to decline the exercise of that jurisdiction simply because the rights asserted may be adjudicated in some other forum.
>
> *Id.* at 55
> (FN. 6)

Several writers, including the Reporter of the American Law Institute Study, have suggested another reason for a "non-exhaustion" rule:

> Federal district court judges . . . deal primarily with federal law flowing from the Supreme Court and circuit courts of appeal. The precedents which bind them and the superiors who guide them all focus on federally derived rights and duties. They are, therefore, more likely to be well versed in the interrelationship of federal due process, equal protection, and Bill of Rights rulings of recent years. A plaintiff whose federal claim is in any way novel may expect, then, a more educated analysis from federal courts than from state remedial tribunals . . . We are, after all, talking about cases involving federally derived rights . . . and these rights by definition should not vary with geography.
>
> Chevigny, Comment, 83 Harv.
> L. Rev. 1352, 1357 (1970)

Similarly, the ALI study found, "There is reason . . . to believe that greater uniformity results from hearing these cases in a federal court. Erroneous application of federal law may result from a misunderstanding as to the law or from a lack of sympathy to it . . . it is difficult to avoid

concluding that federal courts are more likely to apply federal law sympathetically and understandingly than are state courts". *Id.*, at 165-166.

In short, any citizen of a state is a citizen of the United States; when his rights stem from being a United States citizen and from the U.S. Constitution, he should be able to seek redress in a U.S. Court. Federal courts for the protection of federal rights is sound doctrine.

B. Since Prisoners Suing Under §1983 Cannot Be Distinguished From Other Citizens Seeking Similar Redress, A Requirement of Exhaustion in This Case Would Necessitate Uniform Application to Other Citizens

If this Court finds that prisoners must exhaust their state judicial remedies, then, as the current doctrine stands, prisoners will be the only Americans required to do so. Such a stance, however contemplated, would add to the discrimination which prisoners already face as "convicts"; their "second-class citizenship" would be reenforced. If we wish our correctional institutions to really "correct", any acts or policies which confirm to the inmate that he is not able to exercise his rights in the same manner as other citizens, would seem to run counter to that hope and aim. The goal for reformation of our prisons, and of reformation for the prisoner, would tend to become another promise "spoken to the ear, broken to the heart".

It is difficult to see where, if this Court were to accept the State's argument and require prisoners to exhaust their remedies under §1983, the logical stopping point of the holding would be, short of an extensive revision of federal question jursdiction and the general federal relationships which permeate the court system in this country. If prisoners must exhaust their remedies under

§1983, there seems no legitimate way to distinguish them from many other groups of citizens whose grievances with state government may be equally serious. Thus, the Court would be impelled, without the fresh legislative mandate so critical to changes of this magnitude, toward a position requiring exhaustion of state judicial remedies by all citizens before seeking relief in federal courts.

As this Court is aware, §1983, particularly since *Monroe*, has served as the basis for jurisdiction in a multitude of suits. Suits have been brought under §1983 to challenge (1) discrimination in employment, *Hall v. Wethan Bag Corporation*, 251 F. Supp. 184 (D.Tenn. 1966), in education, *McNeese v. Board of Education*, 373 U.S. 668 (1963) and in the use of public facilities, *Bailey v. Patterson*, 323 F. 2d 201 (5th Cir. 1963); (2) complaints of sexual discrimination, *Bowe v. Colgate Palmolive Company*, 416 F. 2d 711 (7th Cir. 1969); *LaFleur v. Cleveland Board of Education*, 465 F. 2d 1184 (6th Cir. 1972), noted 40 U. Cin. L. Rev. 857 (1971); (3) voter disenfranchisement, *Dunn v. Blumstein*, 405 U.S. 330 (1972); and (4) termination of welfare rights, *Goldberg v. Kelley*, 397 U.S. 254 (1970). To suggest, now, that these kinds of plaintiffs, and the numerous others who have employed §1983 to protect their constitutional rights, must first exhaust their state remedies would frustrate the one hundred year development of a coherent policy of federal rights. Yet a holding against respondents in this case would undoubtedly cast such a cloud upon the rights of these groups of plaintiffs.

But then the next question would arise: what is the difference between a citizen filing suit under §1983 and one filing suit under other statutes, e.g. 28 U.S.C. §1344, which allow actions against state officers without exhaustion on either a constitutional or federal pre-emption ground? If fear of federal-state tension is a basis for requiring exhaustion in §1983 cases, it is present, too, in

such other cases. Would not exhaustion be required in those cases as well?

It takes little time to recognize that this logical progression could lead to a severe curtailment of current federal jurisdiction. The federal courts would be relegated, in a large number of situations, to a place of subordination, able to deal with federal rights only after state courts had dealt with them. Only in the small handfull of cases where Congress has expressly declared exclusive jurisdiction such as patents, 35 U.S.C.A. §1 *et seq.;* commerce, 15 U.S.C.A. §1 *et seq.;* copyrights, 17 U.S.C.A. §1 *et seq.;* and Indians, 25 U.S.C.A. §1 *et seq.*, would federal courts be approached just with federal issues. We would have returned, in essence, to the pre-Civil War position of the two court system.[2]

Where first resort to the state courts or to other state proceedings has been desirable, the American Bar Association has supported that course. In a lengthy study and formulation of *Standards Relating to Post Conviction Remedies*, its House of Delegates endorsed the concept of exhaustion in *habeas corpus* cases. The first principle enunciated in that report declares that "the unitary remedy should encompass all claims whether factual or legal in nature and should take primacy over any existing procedure or process for determination for such claims." *Id*, at 23. In the first paragraph explaining that provision, however, the Association emphasized that it did not encompass the normal range of actions covered by the Civil Rights Act as within the principle: "other claims, however, unrelated to

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[2] Some critics of the present rule that exhaustion is not required in §1983 cases admitted as much: "If state courts applied the substantively equivalent remedy standards on which the federal court had relied in dismissing, the res judicata effect of the federal court dismissal would mean *plaintiff's §1983 claim was no longer available as such.*" Note, 82 Harv. L. Rev. 1486, 1503 (1969) (Emphasis added).

the validity of conviction, sentence or custody are not considered 'post-conviction' proceedings in this report: e.g., claims by inmates of denial of freedom of religion in jails; claims of physical mistreatment by custodial officials." *Id.*, at 24.[3]

C. State-Federal Comity Does Not Require Exhaustion; Indeed, Such a Requirement Might Exacerbate that Relationship

Only in rare and exceptional instances has this Court suggested that state remedies must first be pursued by those seeking to vindicate their federal rights. Most important of these exceptions, of course, has been the general doctrine of abstention, first enunciated in *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941). This doctrine, discussed in many articles[4] has been generally applied where there are complex administrative issues to be resolved by administrative agencies of the executive branch, *Burford v. Sun Oil Company*, 319 U.S. 315 (1943); or a mixed issue of federal and state law, *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964) (permitting plaintiffs to withhold from the state forum federal constitutional issues); ambiguous state statutes which may be interpreted to avoid constitutional issues,

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[3] It should be noted that the instant case, although involving challenges to withdrawal of good time credits of the three respondent inmates, based these on abuse of such constitutional rights as First Amendment's Freedom of Speech (Katzoff) and Fourteenth Amendment's due process in disciplinary procedures (Kritsky, Rodriguez).

[4] ALI, STUDY ON THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, 282-298 (1969); Shoenfeld, American Federalism and the Abstention Doctrine in the Supreme Court, 73 Duke L. Rev. 605 (1969); Note, 73 Harv. L. Rev. 1358 (1960).

Reetz v. Bozanich, 397 U.S. 82 (1970) and, on pending suits in state courts on the same issues, see *Abele et al. v. Markel*, Civ. No. 14291 (D.Conn. 1971).

The doctrine, however, is almost universally invoked to ease tensions between federal courts and state legislatures, not state courts. Providing a state court with the opportunity to interpret a state statute does not emanate from concern about interfering with the state court, but from a concern with the dignity of the legislature and the meaning of the legislation. Allowing a state court to deal with intricate administrative remedies and regulations does not result from concern about interfering with the state court, but with articulating the intent of a totality of quasi-legislative acts. Where the regulations are clear, or the issue unencumbered, the *Pullman* doctrine would not allow abstention. Since a prison is not such a quasi-legislative body, abstention would not be proper here.[5]

Second, and more importantly, the abstention doctrine has virtually never been applied to cases involving basic constitutional rights. See *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Zwickler v. Koota*, 389 U.S. 241 (1967); *Harman v. Forssenius*, 380 U.S. 528 (1965).[6]

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[5] Although prison administrators must typically administer a substantial web of living and disciplinary regulations for prisoners, these rarely can be traced to any detailed statutory mandate other than the broad delegation of such administrative authority. Nor are these regulations, in purport or nature. Issues in this area relate chiefly to abuse of broadly defined discretion or failure, as in this case, to follow relatively simple and clear statutory or administrative directives.

[6] In *Zwickler* this Court declared that in any case, abstention should be invoked only in "special circumstances" and that in cases involving basic constitutional rights, abstention was almost never proper, even if the factors of state legislation, or administrative regulation, were present. *Dunn* and *Harman* found that abstention was improper in voting rights cases.

As one writer has noted:

> *The abstention doctrine, then, assumes that there is no general rule that state judicial remedies should be exhausted.* The Supreme Court would not so carefully limit the circumstances in which abstention is appropriate if general deference to state judicial processes were always necessary. Furthermore, *there is no sound policy reason for requiring the exhaustion of state judicial remedies. The choice is not between different types of adjudicatory proceedings, one of which may, as in the case of an administrative hearing, provide a more flexible and expert approach to the problem. Nor is it necessary that relief in federal court will disrupt a comprehensive state regulatory scheme.* The question is simply whether one court or another is going to decide the case. Certainly the availability of alternative state and federal forums is no novelty to our federal system. There may, of course, be an extra burden imposed on the federal courts if litigants tend to choose the federal forum. But *as long as a federal cause of action has been created and appropriate jurisdiction been conferred, it is not for a court to inquire into the burden which Congress has imposed.*
>
> Note, 68 Colum. L. Rev. 1201, 1205-6 (1968) (Emphasis added)

This same approach has been applied to the issue of when federal courts should exercise jurisdiction in connection with injunctions against state court proceedings. In *Younger v. Harris*, 401 U.S. 37 (1971), this Court held that federal courts should not normally issue injunctions against pending state court criminal proceedings, but this was soon modified when the Court recognized that basic

constitutional rights protected under §1983 must be considered an exception to this doctrine. *Mitchum v. Foster*, 407 U.S. 225 (1972).

Thus, the approach which this Court has taken in state-federal "comity" issues appears to be: where a pending state court proceeding is underway, or where anti-injunction federal court action might jeopardize relations with state legislatures or quasi-legislative bodies, or where the issue at hand is whether a state court acted properly in conducting a prior proceeding (*habeas corpus*), it may be justifiable for the federal system to require the party to first seek redress in state court systems. In this context, the current requirement of exhaustion in *habeas corpus* litigation fits snugly. Whether brought by a prisoner attacking his court conviction, *Fay v. Noia*, 372 U.S. 391 (1963); or a conviction yet to be served, *Peyton v. Rowe*, 391 U.S. 54 (1968); whether while on parole, *Jones v. Cunningham*, 371 U.S. 236 (1963); or after release, cf. *Carafas v. LaVallee*, 391 U.S. 234 (1968), the essence is an attack upon a prior adjudication of a state court. Here, then, there is a potential direct conflict with a branch of state government–a state court. To allow that same state system to deal initially with the complaint, as in abstention or injunctions of state court proceedings, effectively acts as a safety valve against state-federal friction.

No such situation is involved in a Civil Rights suit brought under §1983, particularly those brought by prisoners. No state legislative act is directly attacked, and no state court proceeding–pending (§2283) or past (*habeas corpus*)–is challenged. To the extent that a state statute was involved in this case, the issue was compliance with its clear provisions rather than any challenge or attack on those provisions. Nor is there a complex administrative interpretation involved. Deference to state courts, therefore, is unwarranted, and the primacy of federal court jurisdiction established by 28 U.S.C. §1331 is appropriately invoked.

Furthermore, the practical difficulties of requiring exhaustion in any §1983 case are considerable. Would a plaintiff, forced to go to state court first, find himself bound by *res judicata* in the federal court claim if not satisfied with the state court decision?[7] If so, does this not effectively preclude federal jurisdiction? If the answer is that the state court decision is binding only if it is fair and correct, or if the remedies are "adequate", does this not potentially involve the federal courts in overviewing every constitutional decision the state courts render? Would it not require that federal courts determine the "adequacy" of state court remedies including, perhaps, the adequacy of the constitutional analysis and perhaps even of the judgment of state trial judges–thereby adding to, rather than diminishing, the state-federal friction?

As Paul Chevigny has argued:

> "[the present rule of non-exhaustion] keeps federal district court judges from having to exacerbate state federal relations by explicitly finding inadequacies in state remedies every time they agree to hear a §1983 action".
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> Chevigny, Comment, 83 Harv. L. Rev. 1352 (1970)

D. The Burden of Determining Whether Exhaustion is to be Required in Cases of This Kind Should be with Congress, not with this Court

The complexities which these and many other issues of exhaustion might well raise are good reasons for this

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[7] We have already seen that at least one authority believes this to be the case. Note, 82 Harv. L. Rev. 1486, 1503 (1969), quoted *supra*, p. 14.

Court, as a judicial body, to refrain from holding that §1983 must be reinterpreted and re-analyzed to exclude what has always been thought to come under its aegis-original jurisdiction of constitutional claims of citizens of the United States against state officers. If that re-evaluation is to take place, it would seem that Congress is the proper forum for that activity, as was the situation with the *habeas corpus* remedy. After *Fay v. Noia*, 372 U.S. 391 (1963), the question arose as to whether state prisoners would have to exhaust all their state remedies and under what situations. The *Fay* doctrines of deliberate bypass and waiver left many questions unanswered, and lower courts were left in a somewhat unclear and uncertain position. To clarify these points and to consider all of the issues to be balanced in determining a fair and equitable solution, including the public perception, it was Congress that provided the answer to the lower federal courts. Congress responded and rewrote 28 U.S.C. §§2254 and 2255, and required exhaustion of state judical, and where available, administrative remedies.

Habeas corpus is not the only area in which Congress has required exhaustion. In cases of collection of state taxes, 28 U.S.C.A. §1341 and state utility orders, 28 U.S.C.A. §1342, Congress has so required. If §1983 is too broad or sweeping or unduly burdens lower federal courts or the federal judicial system, it is the national legislative apparatus which should accept responsibilities and respond. Congress should weigh the conflicting interests and questions which such a complex and intricate re-alignment would require with full attention to evolving capabilities and stresses at play in both federal and state court systems and contemporary needs for effective preservation of constitutionally-protected values.

This Court has always recognized that where detailed administrative and practical necessities are involved, the

legislature is the proper forum to rewrite existing legislation. As one writer has said:

> Of course Congress has the power to limit the cause of action or the jurisdiction of the federal court to cases in which an available state remedy has been exhausted. Whether Congress intended so to restrict §1983 was one of the issues presented in *Monroe v. Pape.* The Court's apparent conclusion that §1983 was not limited to cases where state judicial remedies had been exhausted is sound, particularly since where Congress has intended such a limitation, its intent has been expressed in clear language.
>
> Note, 68 Colum. L. Rev. 1201, 1206 (1968)

This, *amicus* believes, is the course that should be followed in this case. Over a decade of clear precedent firmly establishes that §1983 does not require exhaustion of remedies for any citizen asserting its protections, including a convicted offender. If there is to be a change in that statute and in its coverage, or if specific kinds or groups of citizens are to be required to exhaust their state court remedies before introducing an action in federal court it would seem that it is the duty and responsibility of the Congress to decide how and when those divisions should be made. For this Court to determine that exhaustion is required without the benefit of full public and legislative hearings and a reassessment of the complex difficulties involved, would, in a very real sense, impel this Court toward a legislative role. The Court has always avoided that path and should do so now.

II. PRISONER'S RIGHTS SUITS UNDER §1983 GENERATED DURING THE 1960's BY IMPORTANT CHANGES IN FEDERAL LAW AND INMATE STATUS, ARE NOW LEVELLING OFF AND PRESENT NO GREATER BURDEN ON FEDERAL COURTS THAN OTHER FEDERAL CIVIL COMPLAINTS

Much has been made of the growth in the volume and complexity of prisoner litigation being filed in state and, to a greater extent, federal courts. Indeed, one of the themes underlying the present controversy over the proper scope of federal judicial involvement in matters of state prison administration has been the practical assertion that this involvement may place undue burdens on the federal court system and its sound administration.[8]

While it is true that prisoners' complaints have increased dramatically over the past decade (2,609 to 16,267

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[8] All seven opinions filed in the court below reflect a concern for the burgeoning number of petitions filed by state prisoners in federal courts. *Rodriguez and United States ex rel Rodriguez v. McGinnis*, 456 F. 2d 79 (2nd Cir. 1972) (in banc). Judge Smith, in addressing this issue, stated:

> Moreover, I question the desirability of even attempting to lighten our burden by stifling or delaying prisoners' complaints of unconstitutional abuse. It may be an onerous burden, especially in districts where large state prisons are located. Many petitions are poorly prepared, confusing and mendacious. They do take the time of busy courts. But these cases now before us demonstrate that among them are some of substance, a circumstance which makes the effort worthwhile. It would be far better to provide more assistance in the districts which contain Attica and other large institutions giving rise to these issues than to deny redress within the federal court system for deprivation of civil rights. *Id* at 82.

from 1961-1972)[9] examination of the data compiled by the Administrative Office of the United States Courts confirms two points: (1) prisoner complaints have, in the recent past (1971-1972), increased proportionately *less* than virtually any other kind of civil litigation; and (2) there is reason to believe that the rapid increase in such suits has levelled off, and will decline as prison systems respond to underlying inadequacies and as alternative methods of delivery of legal services and are made available to prisoners.

In particular, although the rise of state prisoner petitions filed in federal courts under 42 U.S.C. §1983 have engendered a feeling of frustration within the federal judicial system, this growth too should be viewed in proper perspective. The overall rate of increase in civil cases commenced by state prisoners over the last ten years virtually parallels that of private civil actions during the same time frame[10]. However, a number of factors, including (1) prisoner unrest during the 1960's, partially shaped by an increasing awareness throughout our leadership of the pitiful state of our prisons; (2) changes in federal procedure; and (3) the reinvigoration of §1983, have made inevitable the increased use of civil rights statutes by state prisoners

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[9] See Appendix A, "Table 17–Prisoner Petitions filed in United States District Courts Fiscal Years 1961 and 1966 to 1972", 1972 Annual Report of the Director, Administrative Office of the United States Courts. (Hereafter cited as 1972 Annual Report.)

[10] See, Appendix B, "Graph–Civil Cases Commenced Fiscal Years 1961-1972)," 1972 Annual Report. Indeed, the Annual Report reveals that in 1961 civil rights petitions accounted for only .5% of all civil cases commenced in the United States District Courts while prisoner petitions (including civil rights actions brought by prisoners) accounted for 4.5% of all filings. In 1972 we find that civil rights petitions have increased ninefold. By contrast, prisoner petitions, up to 17% of the total civil cases filed, are only four times the 1961 level.

as a vehicle for obtaining federal rights and challenging unconstitutional prison conditions.

A. Increasing Prisoner Unrest, the Inherent Limitations of Federal *Habeas Corpus* and the Impact of *Monroe v. Pape* and Subsequent Rulings have Resulted in a Temporary Increase in Suits Filed by Prisoners Under §1983

A rash of disturbances, work stoppages and tragedies, many involving loss of human life, have swept prisons and jails in New York, Pennsylvania, Ohio, Virginia, New Jersey, Indiana, Florida, the District of Columbia, and California, to name a few. A common thread running through these upheavals is the desire of prisoners to alleviate intolerable living conditions and to regain self-respect lost through a degrading and brutalizing process that is prevelant in far too many prisons today. As one state corrections administrator observed:

> [M]y belief is that [the prisoners'] real problem is their frustrated desire to be treated in a more human way with more fairness in all the subtle contacts between inmates and staff.
>
> . . . We have given prisoners a little more of academic education, vocational training and relaxed rules which permit them to talk in the dining room and to walk casually down the hall . . . These changes suggest to the prisoner that maybe he should be treated like a human being, so this whets his appetite for a more complete accomplishment of a goal of human dignity. However, having whetted his appetite, we have denied him fulfillment in actuality because the prison is still a place where custodial personnel

view prisoners as unworthy beings and in countless little ways reinforce this view with meaningless rules and endless punishments.

Letter from Paul W. Keve,
Commissioner of Corrections,
State of Minnesota, to the
President's Commission on the
Causes and Preventions of Violence,
October 9, 1968

And the President has stated:

The time has come to repudiate once and for all the idea that prisons are warehouses for human rubbish; our correctional systems must be changed to make them places that will correct and educate.

Richard M. Nixon
Address to National Conference on the
Judiciary, Williamsburg, March 11, 1971

With such candor and criticism by those responsible for either the policies governing or the operation of our prisons, it should come as no surprise that prisoners have responded by filing law suits seeking reform. This peaceful effort at self-help has been both constructive and pervasive.

Second, although federal *habeas corpus* petitions have traditionally constituted the largest single category of filings by state prisoners and remains so today, the percentage of *habeas* petitions filed in federal courts is declining.[11] This

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[11] See Appendix A. In 1970, prisoner *habeas corpus* petitions reached their zenith and accounted for 12.2% of the total civil cases filed. By 1972, this figure had dropped to 9.7% while the volume of civil cases had increased over 10% during the same two year period.

drop-off in the rate of increase of federal *habeas* petitions is consistent with the general levelling off trend of all prisoner cases and in no way suggests that petitions which formerly would have been filed under the federal *habeas corpus* statutes are now gaining direct access to the federal courts as distorted §1983 actions.

The basic legislative and judicial limitations implicit in concept of federal *habeas corpus* have remained basically unchanged, although strict construction of the "in custody" theory of jurisdiction has experienced some relaxation. See, *Carafas v. LaVallee*, 391 U.S. 234 (1968); *Peyton v. Rowe*, 391 U.S. 54 (1968); *Jones v. Cunningham*, 371 U.S. 236 (1963). Likewise, the rule, first enunciated in *Ex Parte Royal*, 117 U.S. 241 (1886), that federal courts may require exhaustion of state remedies prior to hearing a state prisoner's *habeas corpus* claims has undergone modification. *Fay v. Noia*, 372 U.S. 391 (1963); *Townsend v. Sain*, 372 U.S. 293 (1963). But in no sense is *habeas corpus* the normal path for those who, while not attacking their conviction, seek to be relieved of conditions of their confinement. Of course, it can be argued that every restriction in a prison setting is due to the conviction, and to that extent, a suit to remove those restrictions attacks the results of conviction. But it would distort the entire history of *habeas corpus*, as well as the thrust of §1983, to suggest that these are attacks on the "confinement" itself. It is true that some prisoner complaints have been brought under *habeas corpus*, rather than under §1983, but these have been almost uniformly attacks upon confinement in solitary confinement, See e.g. *Howard v. Smith*, 365 F. 2d 428 (4th Cir. 1966); *Fulwood v. Clemmer*, 206 F. Supp. 370 (D.D.C. 1962); *Abernathy v. Cunningham*, 393 F. 2d 775 (4th Cir. 1968). Two factors distinguish these cases: (1) release from a particular confinement was sought, thus making *habeas* a satisfactory remedy; and (2) in such cases, exhaustion would be unnecessary, since delay would be

unconscionable, in any event. *Habeas corpus,* then, is generally perceived as a remedy which seeks to overturn the direct consequences of conviction and one which attends the validity, as opposed to the conditions, of confinement. See, *Edwards v. Schmidt,* 321 F. Supp. 68 (W.D. Wisc. 1971).

Last, and highly significant to the surge of prisoner complaints brought under §1983, is this Court's decision in *Monroe v. Pape,* 365 U.S. 1967 (1961). Although not factually related to the rights of prison inmates, *Monroe* concluded that the purpose of the Civil Rights Act was to provide a federal remedy for violation of constitutional rights by state officials, regardless of whether the petitioner had first exhausted state remedies. Prior to *Monroe,* federal courts had generally followed a "hands-off" approach to civil suits brought by prisoners. The oft repeated reasons used to justify the "hands-off" approach were: (a) that the Eighth Amendment's prohibition against cruel and unusual punishment did not apply to the states, (b) reluctance to interfere in the internal discipline of state prisons, and (c) the need to utilize state remedies in the first instance. *Wright v. McMann,* 387 F.2d 519 (1967). Thus, *Monroe* effectively abrogated the "hands-off" doctrine under which correctional administrators had for so long operated free of federal judicial review.

Any remaining uncertainty that the "hands-off" approach might still be selectively applied to prisoners as a separate class was eliminated soon after the *Monroe* decision. *Robinson v. California,* 370 U.S. 660 (1962), which found that the Eighth Amendment applied to the states through the Fourteenth Amendment, and *Cooper v. Pate,* 378 U.S. 546 (1964), a decision holding that refusal to permit a prisoner access to religious publications stated a cause of action, made explicit the applicability of the Civil

Rights Act to state prisoner's claims of unconstitutional treatment. In the aftermath of these decisions, it was only logical that prisoners, with an emerging sense of political consciousness and personal outrage, should attempt to avail themselves of appropriate judicial remedies. It is no coincidence that with this abandonment by the courts of the hands off doctrine the first meaningful reform in the conditions and treatment of prisoners has occurred.

B. Prisoner Petitions Filed Under §1983 are Increasing at a Slower Rate and Involve Proportionately Less Trials than Most Other Civil Suits

Analysis of data collated by the Administrative Office of the United States Courts shows that while prisoner suits filed during fiscal year 1972, including those filed under §1983, increased some 1% over 1971, this was actually smaller than the 3% increase of all civil suits.[12]

Litigation in commerce clause cases, deportation cases, social security actions, forfeiture and penalty suits, and civil rights actions generally all involved a noticeably higher increase rate than prisoner suits:

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[12] See, Appendix C, "Table 16—Civil Cases Commenced in the United States District Courts During the Fiscal Years 1961-1972, by Nature of Suit", 1972 Annual Report. §1983 suits today constitute less than 21% of all prisoner filings in federal courts (with 57% for federal *habeas*, and 22% for all other prisoner petitions filed in federal courts).

Type of Case	Increase in 1972 Over 1971
ICC cases	65.6%
Deportation cases	42.9%
Social Security Actions	27.7%
Forfeiture and Penalty Suits	26.3%
Civil Rights Actions (not including prisoners' Civil Rights Actions)	19.4%
Mortgage foreclosures	16.5%
Prisoner Petitions	0.0%*

(*There was *one* more prisoner petition filed in 1972 than in 1971, as compared with increases of 1.7% in 1971 over 1970, and 23.8% in 1970 over 1969).

Additionally, there is good reason to believe that the increase of prisoner civil rights actions is only temporary. A study of petitions filed by state and federal prisoners over the last ten years shows that filings increased dramatically during the mid-sixties followed by a levelling off period from 1969 to the present.[13] This suggests that any crisis in the federal caseload occasioned by an influx of §1983 and other cases filed by state prisoners is, at worst, transitional and, at best, over.

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[13] See, Appendix D, "Graph–Petitions Filed by State and Federal Prisoners", 1972 Annual Report.

As the following tables demonstrate, prisoner §1983 actions constitute only a negligible percentage of the total federal civil caseload. In fact, the rate of increase of these cases is not only falling, but falling more rapidly than other civil rights actions commenced during the last two years.

TABLE I. Total Prisoner–Civil Caseload Comparison

	1968	1969	1970	1971	1972
Percentage of Prisoner Civil Rights Cases to Total Prisoner Cases	9.6%	9.8%	12.7%	17.9%	20.6%
Percentage of Prisoner Habeas Corpus Cases to Total Prisoner Cases	67.5%	67.6%	66.6%	61.7%	57.3%
Percentage of Prisoner Civil Rights Cases to Total Civil Cases	1.5%	1.7%	2.5%	3.4%	3.7%
Percentage of Prisoner Habeas Corpus Cases to Total Civil Cases	10.5%	11.3%	12.2%	10.7%	9.7%
Percentage of Total Prisoner Cases to Total Civil Cases	15.6%	16.7%	18.3%	17.4%	16.9%

TABLE II. Civil Rights Actions–Prisoner and Other

	1968	1969	1970	1971	1972
Total Civil Rights Cases Commenced in Federal Courts	2768	3803	6151	8267	9733
Total Prisoner Civil Rights Cases Commenced in Federal Courts	1132	1350	2166	3129	3600
Total of Other Civil Rights Cases Commenced in Federal Courts	1636	2453	3985	5138	6133
Increase of Total Civil Rights Cases Over Previous Year	–	37.3%	61.7%	34.1%	17.7%
Increase of Prisoner Civil Rights Cases Over Previous Year	–	19.2%	60.4%	44.4%	15%
Increase of Other Civil Rights Cases Over Previous Year	–	49.9%	62.4%	26.6%	19.4%

The 1972 Report of the Director of the Administrative Office further states that any rise in civil rights filings by prisoners will more than likely be offset both by the steady improvement of post-conviction remedy systems and the increased availability of counsel for indigent petitioners to assess the practicality of many *habeas corpus* petitions. The 1972 Annual Report also notes that this Court's opinion in *Furman v. Georgia*, 408 U.S. 238 (1972), a decision which set aside the sentence of over 600 death row inmates, removes from the federal courts numerous petitions of a highly complex and time-consuming nature and should go far toward easing federal court workloads.[14]

Similarly, the proposition that civil rights actions consume more court time owing to the frequent necessity of a court hearing and the more liberal discovery techniques provided for under the Federal Rules of Civil Procedure, does not stand up under scrutiny:

> A sample of 100 private civil rights cases reported in the Federal Supplement from December, 1966 to March, 1968, shows that sixty-seven were dismissed without a trial or hearing, the vast majority on the face of the complaint. This statistic suggests that §1983 cases even now are quickly disposed of and posed little time problem for federal courts. In the remaining thirty-three cases, plaintiffs obtained preliminary relief in twelve without an evidentiary hearing. Only seven cases appear to have been tried, and five of those resulted in a judgment for the plaintiff. Most important, the seventeen cases in which the plaintiff had judgment involve important civil rights issues.
>
> Chevigny, Comment, 83 Harv. L. Rev. 1352, 1357 (1970)

[14] 1972 Annual Report at 31, 32.

The Administrative Office statistics show, further, that prisoner §1983 actions result in a smaller proportion of trial hearings than virtually any other kind of civil action. (3.4% as opposed to 16.1% for general civil rights actions; 13.2% for patent actions and 15.6% for actions brought under the Fair Labor Standards Act.)[15] Also, the trial rate is not significantly larger for §1983 actions than for federal *habeas corpus* actions (3.4% as opposed to 3%).[16]

Indeed, it may well be that the availability to state prisoners of the federal forum and its rules of procedure will, in the long run, reduce the volume of their complaints. The federal class action, a procedural device not generally transferable to *habeas corpus* proceedings, provides a mechanism for litigating constitutional issues which affect large numbers of an inmate population. Landmark decisions have already established precedents which place state correctional administrators on notice of acceptable standards for prison conditions and operation and have stirred both the public and private sectors to a renewed sense of concern and urgency over prison deficiencies.[17]

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[15] See, Appendix E, "Table C.4.–Civil Cases Terminated During the Fiscal Year Ended June 30, 1972 by Nature of Suit and Action Taken", 1972 Annual Report.

[16] *Id.*

[17] The impetus for these decisions can probably be traced back to the case of *Jordan v. Fitzharris*, 257 F. Supp. 674 (N.D. Cal. 1966). In *Jordan*, Chief Judge George Harris, registering an acute sense of outrage over the conditions he saw at California's Soledad prison complex, took steps to "restore the primal rules of a civilized community in accord with the mandate of the Constitution of the United States". Federal appellate courts have subsequently ordered or initiated sweeping relief when prison conditions or practices deny to prisoners federally protected rights. See, e.g., *Nolan v. Fitzpatrick*,

(Continued on page 33)

C. Development of Alternative Mechanisms for the Resolution of Potential Prisoner Court Claims Promises to Reinforce the Recent Stabilization of Prisoner Petitions, and Reduce the Federal Caseload in this Area

Rapidly developing new resources for the delivery of legal services and viable non-judicial alternatives for the resolution of prisoner complaints and grievances promise to reinforce the downtrend of the last three years.

It is well documented that the prisoner, often confined in remote institutions far from home, family and friends, is urgently in need of a broad range of legal guidance and assistance probably more so than indigents in the community-at-large.[18] Prisoners' right of access to the courts, recently affirmed by this Court in *Gilmore v. Lynch*, 319 F. Supp. 105 (N.D.Cal. 1970), aff'd. *sub. nom. Younger v. Gilmore*, 404 U.S. 15 (1971); see *Johnson v. Avery*, 393 U.S. 483 (1969), can, however, be neutralized, with detrimental consequences to the court administration, if a prisoner is incapable of making himself heard and,

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(Footnote 17 continued from page 32)

451 F. 2d 545 (1st Cir. 1971); *Gray v. Creamer*, 465 F. 2d 179 (3rd Cir. 1972); *Brown v. Peyton*, 437 F. 2d 1228 (4th Cir. 1971); *Jackson v. Godwin*, 400 F. 2d 529 (5th Cir. 1972); *Jones v. Metzger*, 456 F. 2d 854 (6th Cir. 1972); *Hahn v. Burke*, 430 F. 2d 100 (7th Cir. 1970); *Moore v. Ciccone*, 459 F. 2d 574 (8th Cir. 1972); *Earnest v. Willingham*, 406 F. 2d 861 (10th Cir. 1969).

18 " 'Jailhouse Lawyers'—inmates with a claimed expertise of a kind—are often the only help a prisoner has . . ." National Council on Crime and Delinquency, A Model Act for the Protection of Prisoners, 14 (1972). See generally, Jacob and Sharma, Justice After Trial: Prisoner Need for Legal Services in the Criminal Correctional Process, 18 Kan. L. Rev. 493 (1970); Goldfarb & Singer, Redressing Prisoner Grievances, 39 G.W.L.Rev. 175 (1970).

hopefully, understood. According to the American Bar Association's Criminal Justice Standards Project:

> The best way to stem the flow of applications and, conversely, to bring forward meritorious applications, is to educate the prisoner population on the respective utility and futility of applying. The optimal form of education would involve face-to-face interviews between prisoners and attorneys who could advise them of the probable merits or lack of merit in their grievances.
>
> Standards Relating to Post-Conviction Remedies 50 (Approved Draft 1968)

Put simply, prisoners have attempted to do for themselves what the legal profession and others have failed to do for them. Recognition of this crushing need on the part of prisoners for legal advice and counselling has evoked a variety of encouraging responses both private and public.

A recent report of the United States Department of Justice reveals that 43.2% of the nation's law schools are now engaged in the provision of a wide variety of legal services to prisoners through supervised clinical legal education programs.[19] Of these, approximately two-thirds have commenced since 1969. The American Bar Association's Commission on Correctional Facilities and Services reports that twenty-one state, and fourteen local bar associations have ongoing correctional reform committees. The Texas

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[19] Summary Report, "Perspectives on Prison Legal Services: Needs, Impact and the Potential for Law School Involvement", United States Department of Justice (1972). The Council on Legal Education for Professional Responsibility, a privately funded program, has made grants to the law schools of fifteen universities to provide support for clinical programs in corrections. C.L.E.P.R. Newsletter, Volume IV, No. 13, May 1972.

Criminal Justice Council, responding to a decision of the Fifth Circuit which held that a Texas Department of Corrections regulation against "jailhouse lawyer" assistance could not be permitted to stand absent provision of a reasonable alternative, *Novak v. Beto*, 453 F. 2d 661 (1971), allocated substantial federal anti-crime funds for hiring attorneys and establishing law libraries for inmates.

Finally, the concept of establishing a state correctional ombudsman, long an accepted method of resolving prisoners' grievances in European correctional systems, is beginning to gain currency and stimulate experimentation in this country. At least fifteen separate jurisdictions either have already instituted ombudsmen or have programs on the drawing boards.[20] Private organizations such as the American Bar Association's Resource Center for Correctional Law and Legal Services, the District of Columbia's Center for Correctional Justice, and the National Center for Dispute Settlement of the American Arbitration Association are developing prototypes and providing technical assistance to groups wishing to establish institutional grievance procedures or other mechanisms for the negotiation of prisoner complaints. The development of these mechanisms to mediate the problems of our correctional systems and the offenders in their custody has been recognized as critically important to the problem of unreasonable demands on courts and the litigation process.

The foregoing suggests that however real the case load problems may be in a period of judicial and offender activism, the solution lies less with rearrangement of existing concepts of exhaustion of judicial remedies than with the development of administrative and non-litigation

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[20] These jurisdictions include: Arizona, California, District of Columbia, Illinois, Iowa, Massachusetts, Maryland, Minnesota, New Jersey, New York City, New York State, Ohio, Oregon, Pennsylvania and Washington.

alternatives for redress now on the horizon. Utilization of these new and more responsive administrative remedies (including their exhaustion prior to seeking court redress) adds to the hopeful signs for the further reduction in prisoners' court actions.

CONCLUSION

For the above reasons, amicus respectfully urge this Court to affirm the decision of the Second Circuit Court of Appeals.

Respectfully submitted,

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I, Robert Meserve, attorney for amicus, hereby certify that 3 copies of this brief were duly served upon attorneys for both parties by mail service, postage pre-paid.

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Robert Meserve

Table 17
Prisoner Petitions Filed in the U.S. District Courts
Fiscal Years 1961 and 1966 to 1972

Type of petition	Fiscal years								Percent change	
	1961	1966	1967	1968	1969	1970	1971	1972	1972 over 1961	1972 over 1971
Total all petitions	2,609	8,580	10,983	11,152	12,924	15,997	16,266	16,267	523.5	--
Petitions by Federal prisoners	1,589	2,292	2,649	2,851	3,61.	4,185	4,121	4,179	163.0	1.4
U.S. Parole Board reviews	161	64	104	141	150	232	202	288	66.5	42.7
Motions to vacate sentence	560	864	978	1,099	1,444	1,729	1,415	1,681	189.1	18.8
Habeas corpus	868	1,017	1,045	1,045	1,374	1,600	1,671	1,368	57.6	-18.1
Other prisoner petitions	(1)	348	532	576	693	624	813	952	174.6	8.3
Mandamus, etc	-	349	474	516	564	488	699	700	100.3	0.1
Civil rights	-	15	58	60	81	136	214	252	1,580.0	17.8
Petitions by state prisoners	1,020	6,288	7,804	8,301	9,312	11,812	12,145	12,088	1,085.1	-0.5
Habeas corpus	1,020	5,349	6,201	6,488	7,359	9,063	8,372	7,999	679.3	-5.1
Other prisoner petitions	(1)	909	1,603	1,813	1,953	2,749	3,773	4,139	355.3	9.7
Mandamus, etc	-	691	725	741	684	719	858	791	14.5	-7.8
Civil rights	-	218	878	1,072	1,269	2,030	2,915	3,348	1,445.8	14.9

[1]Included with habeas corpus.

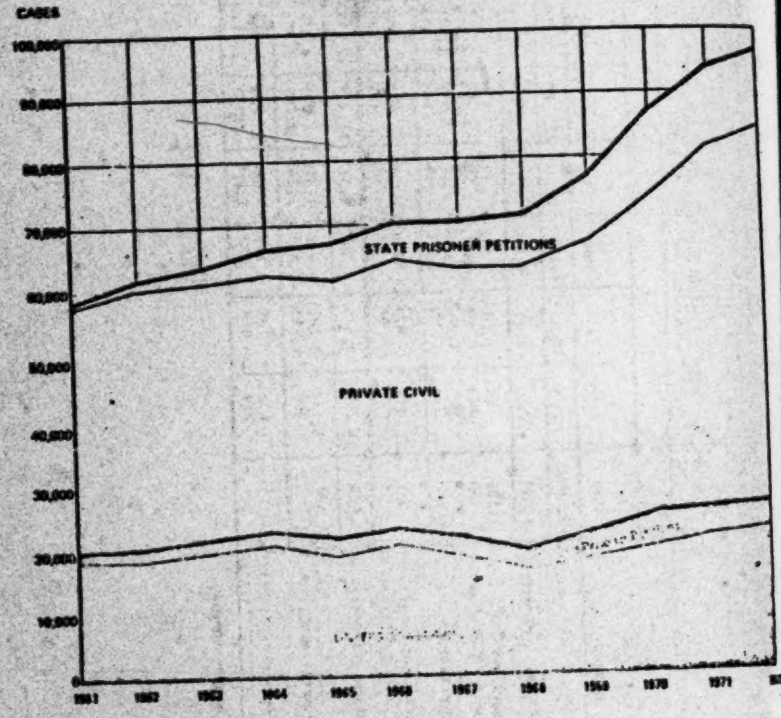
APPENDIX B

II-26

UNITED STATES DISTRICT COURTS

CIVIL CASES COMMENCED

FISCAL YEARS 1961–1972



Source: Administrative Office of the United States Courts.

APPENDIX C

Table 16

Civil Cases Commenced in the U.S. District Courts During the Fiscal Years 1961-72, by Nature of Suit

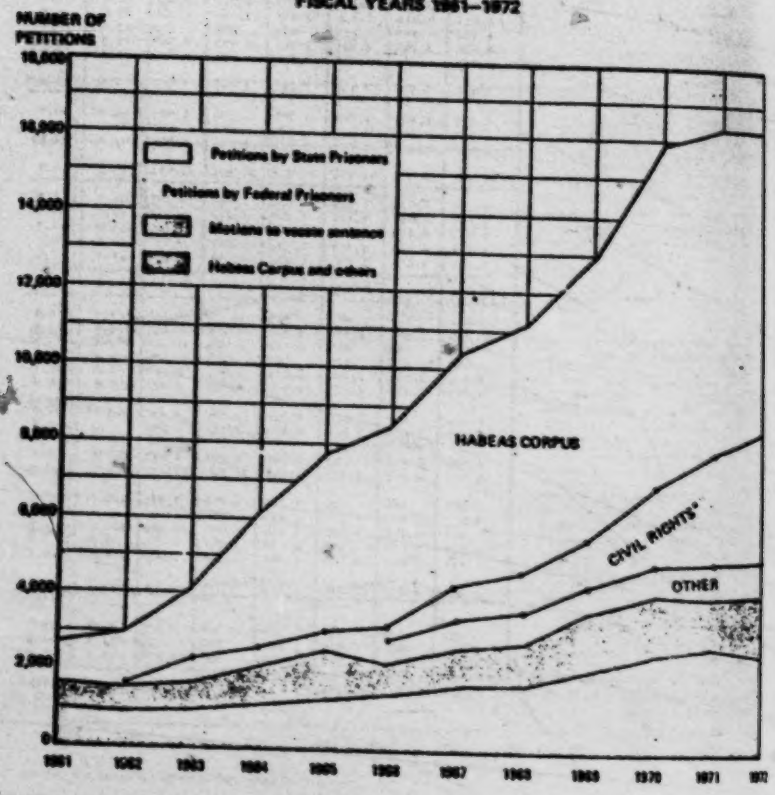
Nature of Suit	Cases Filed						Percent Change 1972 over 1961	Percent Change 1972 over 1971
	1961	1968	1969	1970	1971	1972		
Total	58,293	71,459	77,196	87,321	93,396	96,193	65.0	3.0
Contract actions	16,349	18,474	18,951	17,157	16,535	16,977	16.1	2.2
Insurance	1,586	2,372	2,381	2,522	2,732	2,572	62.6	-5.9
Marine	2,412	2,859	2,636	3,496	3,649	3,681	40.2	-4.9
Miller Act	1,333	915	735	916	718	572	-57.1	-20.3
Negotiable instruments	4,070	3,388	2,567	2,971	2,996	3,205	-21.3	6.9
Other	6,939	8,149	6,430	7,252	6,497	6,947	33.3	6.8
Real property actions	3,317	3,969	3,727	3,284	3,600	3,554	6.8	-1.5
Mortgage foreclosure	1,326	1,946	1,664	1,349	1,448	1,921	44.9	16.6
Land Condemnation	997	926	1,020	890	891	602	-39.6	-32.4
Other	1,663	1,103	1,053	1,055	1,069	1,030	2.7	-3.6
Tort actions	21,305	23,979	24,713	25,329	25,485	24,012	11.2	-5.5
Employers' Liability Act	1,114	1,074	1,293	1,292	1,353	1,391	24.9	2.8
Marine	4,809	6,717	7,111	7,257	7,232	6,564	33.6	-9.7
Motor vehicle	9,083	9,679	9,504	9,963	8,779	7,700	-15.2	-12.3
Other personal injury	4,574	4,969	5,369	5,792	6,047	6,411	40.3	6.2
Property damage	1,545	1,417	1,496	1,816	1,994	1,966	27.4	-1.3
Actions under statutes	13,627	26,635	31,232	39,348	41,394	47,701	253.0	8.6
Antitrust	420	747	763	929	1,505	1,379	228.3	-8.4
Civil rights	296	1,636	2,453	3,985	5,130	6,133	1972.0	19.4
Commerce (ICC rates, etc.)	335	663	856	1,132	2,014	3,335	895.5	65.6
Deportation	316	143	129	144	119	170	-46.2	42.9
Forfeiture and penalty suits	2,340	2,629	1,203	1,459	2,831	2,565	8.7	26.3
Labor laws	2,464	3,518	3,721	3,999	4,461	4,687	100.8	6.9
Narcotic Addict Rehabilitation Act	-	387	2,011	3,268	2,725	2,430	553.7[1]	-7.2
Patent, copyright and trademark	1,585	1,829	1,865	2,150	2,042	2,194	38.4	7.4
Prisoner petitions:								
Federal	1,589	2,851	3,613	4,185	4,121	4,179	163.0	1.4
State	1,020	8,371	9,317	11,012	12,145	12,080	1085.1	-0.5
Securities, commodities and exchange	367	489	396	1,211	1,962	1,919	618.7	-2.2
Selective Service Act	(1)	(2)	(2)	447	695	291	-	-58.6
Social Security laws	537	1,180	1,572	1,735	1,702	2,296	326.1	27.7
Tax suits	1,557	1,670	1,452	1,509	1,464	1,464	-2.9	-
Other	711	964	1,470	1,383	1,324	1,989	179.7	49.1
Other actions	3,995	2,442	2,340	2,212	2,058	2,130	-46.7	3.5
Domestic relations (local jurisdiction)	393	648	700	758	758	938	138.7	23.7
Immunity (local jurisdiction)	2,541	820	816	536	317	272	-89.3	-14.2
Other	1,061	994	1,044	918	983	920	-13.3	-6.4

[1]Percent change since fiscal year 1968 when Title III, Narcotic Addict Rehabilitation Act took effect.
[2]Included with other.

UNITED STATES DISTRICT COURTS

PETITIONS FILED BY STATE AND FEDERAL PRISONERS

FISCAL YEARS 1961–1972



*"Civil Rights" prior to 1966 are included in "Other Prisoner Petitions".

Source: Administrative Office of the United States Courts.

APPENDIX E